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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MARC SPITZER, Chairman
JIM IRVIN
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON

In the matter of:

INTERSECURITIES, INC.
570 Carillon Parkway
St. Petersburg FL 33716-1202

GREGORY RUSSELL BROWN AND JANE
DOE RUSSELL, husband and wife
16417 South 15th Drive
Phoenix AZ 85045
CRD #2233684

Respondents.

DOCKET NO. S-03482A-03-0000

**SECURITIES DIVISION'S
RESPONSE TO
INTERSECURITIES, INC.'S
MOTION FOR JURY TRIAL**

Arizona Corporation Commission

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The Securities Division submits its Response to Respondent InterSecurities, Inc.'s
("Respondent" or "ISI") Motion for Jury Trial.

RESPECTFULLY SUBMITTED this 23rd day of September, 2003.

By

Pamela Johnson

Pamela Johnson

Attorney for the Securities Division

MEMORANDUM OF POINTS AND AUTHORITIES

I.

SUMMARY OF ARGUMENT

Based on the theory that the remedy sought by the Securities Division is so excessive as to
constitute punishment, Respondent has moved for a jury trial in this proceeding and, in the absence
of the Arizona Corporation Commission's ("Commission's") ability to empanel a jury, Respondent

1 has requested the proceeding be brought in superior court for a jury trial of this matter. The
2 Commission is the appropriate forum for this case. This is not a case of first impression. This is
3 simply a respondent requesting a procedure that is not appropriate for this forum.

4 Respondent is a full-service dealer registered under the Arizona Securities Act. ISI's
5 salesman, Gregory Russell Brown ("Brown"), also a respondent here, sold \$2.7 million in
6 telephone investment contracts to 49 Arizona investors. ISI was aware of, and authorized the sale
7 of the contracts. ISI now seeks to defend the inappropriate authorization, and its failure to
8 supervise Brown, with an argument that the payphone investment contracts are not securities and it
9 received no financial benefit from their sale. Plainly, the telephone investment contracts are
10 securities and ISI should never have approved their sale. Brown offered these securities as
11 "alternative" investments to existing ISI clients and potential new clients, thereby expanding his,
12 and potentially ISI's, client base. ISI's conduct involving these sales violated the Arizona
13 Securities Act, exposing clients of both Brown and ISI to unjustified and undisclosed risks, and
14 unfair losses. ISI now seeks to avoid adjudication by the Commission of its wrongful conduct and
15 the imposition of administrative sanctions for that conduct, including appropriate restitution,
16 arguing that it is entitled to a jury trial in superior court instead.

17
18 That argument fails because the Commission is empowered by constitution, statute, and
19 procedural rule to adjudicate the claims against ISI and Brown. The United States Supreme Court
20 has clearly held that the adjudication of a public right, such as the enforcement of securities laws, is
21 properly a matter for administrative proceedings and no jury trial is required. The procedures of
22 the Commission in this administrative law forum provide the respondents with due process and a
23 full opportunity to defend against the claims and remedies asserted. Further, restitution is not a
24 punitive remedy and does not implicate a right to jury trial. Respondent's demand must be denied.

25 ...
26

II.

BRIEF STATEMENT OF FACTS

Respondent Brown, a salesman for Respondent ISI, sold \$2.7 million in payphone contracts, sponsored by ETS Payphones and Alpha Telecom, among others, to 49 Arizona investors over a period of one year. The investment contracts were never registered with the Commission. ISI, relying upon Brown's representation that the payphone investment contracts were not securities, authorized Brown to sell them. ISI is a registered dealer under the Arizona Securities Act and has compliance and legal departments with expertise in securities law and related compliance issues. When ISI approved Brown's activity, other states had already ordered ETS Payphones and Alpha Telecom, to cease and desist from the sale of unregistered securities under those states' securities laws. Additionally, at the time ISI approved Brown's sales of payphone contracts, ISI knew that the Securities Division had brought enforcement actions against other companies sponsoring Arizona sales of payphone contracts. ISI's determination that the products were not securities was not reasonable, its authorization of Brown's sale of the products was not reasonable, and its failure to supervise Brown's sale of those securities was not reasonable. The facts of this case demand a determination by this tribunal of the scope of the liability of dealers who approve the sale of unregistered securities as "outside business activity" and then attempt to absolve themselves of all responsibility for illegal conduct of salesmen and subsequent investor losses. The issues of law and facts are appropriate for the review and decision of the Commission with its expertise and authority to decide cases arising under the Arizona Securities Act.

The central issues in this case involve questions of both law and fact: (1) Are the payphone investments securities? (2) Was ISI's conduct and supervision of Brown reasonable under the facts and circumstances of this case? (3) Did ISI receive a financial benefit through Brown's expansion of its client base, and is financial benefit a necessary element to establish ISI's liability under the Arizona Securities Act? (4) Is ISI primarily liable, secondarily liable, or both? and (5) What remedies are appropriate under the facts of this case? These are questions best addressed by the

finder of fact and law in this forum, the Commission. Respondent will have the opportunity to fully defend in this forum.

III.

RESPONDENT IS NOT ENTITLED TO A JURY TRIAL IN PROCEEDINGS BEFORE AN ADMINISTRATIVE AGENCY

A. **When A Proceeding Implicates Public Rights, And The Legislature Has Provided A Proper Administrative Forum For Adjudicating The Action, The Right To A Jury Trial Is Inapplicable.**

The United States Supreme Court has held that jury trials are not available in an administrative proceeding. See *Tull v. United States*, 481 U.S. 412, 418, n.4 (1987)(citing *Atlas Roofing Co. v. Occupational Safety and Health Review Com'n*, 430 U.S. 442 (1977) (the Seventh Amendment of the United States Constitution is not applicable to administrative proceedings)). Judicial power can be delegated to administrative agencies in order to obtain expertise in certain areas of the law and a more efficient, expeditious, and inexpensive mechanism for enforcement of the law. See Aman, Alfred C., *Administrative Law*, § 5 (1993). Legislatures can assign to administrative agencies the power to enforce certain laws, or adjudicate certain "public rights." *Crowell v. Benson*, 285 U.S. 22, 50-51 (1932). These are situations in which the government acts in its sovereign capacity to enforce public rights under statute. *Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1423 (9th Cir.1994)(citing *Atlas Roofing Co.*, 430 U.S. 442). When acting to enforce the Arizona Securities Act, the Commission acts to protect the public right to be free from fraudulent securities transactions and to preserve fair and equitable business practices.

Respondent claims that the possible remedies in this case are severe penalties, tantamount to punishment, requiring a jury trial. In cases involving public rights, fact finding and initial adjudication can be assigned to an administrative forum where a jury is not provided, even if the right to a jury would exist in a court. *Id.* "In certain situations, of course, Congress may fashion causes of action that are closely *analogous* to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989)(emphasis in original); see

1 also Dobbs, Dan B., Law of Remedies, Vol. I, § 2.6(3), Ch. 2, p.166 (2d Ed. 1993)(Congress can
2 assign litigation to a non-Article III court and prescribe a non-jury trial).

3 One of the intended efficiencies of administrative agencies is the expertise that can be
4 developed in a particular area of law. The use of the agency as fact finder, not a jury, furthers that
5 intent. *See Curtis v. Loether*, 415 U.S. 189, 194 (1974)(the use of a jury as a fact finder is not
6 consistent with the concept of expertise on which the administrative agency rests). The Arizona
7 legislature enacted the Arizona Securities Act, charged the Commission with its enforcement, and
8 provided for adjudication procedures under the Act. It did not provide for a jury trial in this forum.
9 When a proceeding implicates public rights, and the legislature has provided a proper
10 administrative forum for adjudicating the action, the right to a jury trial is inapplicable. *See*
11 *Simpson*, 29 F.3d at 1424; *see also Atlas Roofing*, 430 U.S. at 455 (Seventh Amendment does not
12 prevent Congress from committing litigation to administrative agencies with special competence in
13 the relevant field).

14 **B. The Commission Is Legislatively Authorized To Fashion A Remedy Under The**
15 **Arizona Securities Act Without Providing A Jury Trial.**

16 Respondent argues that the restitution and administrative penalties sought by the Securities
17 Division are tantamount to “severe penalties,” requiring a jury trial under common law.
18 Respondent’s argument is wrong because (1) the Arizona legislature has charged the Commission
19 with the enforcement of the Arizona Securities Act and provided a procedure before the
20 Commission that guarantees due process and does not include a jury trial; (2) jury trials are not
21 required when protecting a public right, and the purpose of the Arizona Securities Act is to protect
22 the public; and (3) the Arizona legislature has determined that restitution and administrative
23 penalties are appropriate remedies to effect the purpose of the Arizona Securities Act.

24 **1. The Legislature Charged The Commission With Enforcement Of The Arizona**
25 **Securities Act Without Providing A Jury Trial.**

26 Respondent argues the Arizona Constitution provides it with the right to a jury trial in this
proceeding. The constitution states that the right of trial by jury shall remain inviolate. Ariz.

1 Const. art. 2, § 23. Respondent's caselaw is exclusively based on the right to a jury trial in
2 criminal proceedings and discusses the right to a jury trial as it existed at common law. The
3 Arizona Constitution did not *grant*, but *reserved* a pre-statehood right. *Benitez v. Dunevant*, 198
4 Ariz. 90, 93, 7 P.3d 99, 102 (2000) (emphasis in original). The right to a jury trial is not, and has
5 never been, a right a defendant could invoke in all instances, even in charges of a criminal nature.
6 *Rothweiler v. Superior Court of Pima County*, 100 Ariz. 37, 41, 410 P.2d 479, 482 (1966)(citing
7 *State v. Cousins*, 97 Ariz. 105, 397 P.2d 217 (1964)).

8 In the present case, Respondent violated provisions of the Arizona Securities Act adopted
9 by the Arizona legislature in 1951, as amended. The Arizona legislature has charged the
10 Commission with the enforcement of the Arizona Securities Act. A.R.S. § 44-2032. *See also*
11 *Carrington v. Arizona Corp. Com'n*, 199 Ariz. 303, 306, 18 P.3d 97, 100 (App.2001), *rev. denied*.
12 In 1986, the Arizona legislature, fully aware of the procedure provided in a Commission hearing,
13 authorized the Commission to order restitution to correct the conditions created by violations of the
14 Arizona Securities Act. A.R.S. § 44-2032(1). The Arizona legislature also authorized the
15 Commission to impose administrative penalties. *See* A.R.S. § 44-2036. Respondent is not entitled
16 to a jury trial in this forum regardless of which authorized remedy the Securities Division seeks.
17 The United States Supreme Court has stated the right to a jury trial turns not solely on the nature of
18 the issue to be resolved, but also on the forum in which it is to be resolved. *Atlas Roofing*, 430
19 U.S. at 461. In some cases, the government can validly opt for administrative enforcement without
20 judicial trial. *Id.* at 460. The Arizona legislature has done so by authorizing the Commission to
21 conduct the present proceeding and to order the remedies provided under the Act.

22 **2. Jury Trials Are Not Required When Protecting A Public Right And The**
23 **Purpose Of The Arizona Securities Act Is To Protect The Public.**

24 Enforcement of the Arizona Securities Act protects a public right. The primary purpose of
25 the Act is to protect the public from fraudulent securities transactions and to preserve fair and
26

1 equitable business practices. *See* Laws 1951, ch. 18, § 20.¹ The Act is also designed to provide
2 remedial measures, when necessary. *Id.*; *see also Jackson v. Robertson*, 90 Ariz. 405, 409-410, 368
3 P.2d 645, 648 (1962)(Act is designed to be prophylactic, remedial if necessary). To protect the
4 public, the Act imposes a variety of requirements on parties selling securities, including disclosure
5 of material information, reporting requirements for ongoing activities, and oversight
6 responsibilities for agents. In the present case, 49 Arizona citizens have lost up to \$2.7 million in
7 the transactions effected by Brown, ISI's salesman. ISI was in the position to, and had the
8 responsibility to, oversee Brown's securities activities. A very basic precept of securities laws is
9 that it is the wrongdoer, not the victim, who should bear the cost of securities law violations. The
10 imposition of administrative penalties and the remedy of restitution are consistent with this public
11 policy of prevention and remedial measures that underlie Arizona securities law.

12 **3. The Commission Is Authorized To Order Restitution And Administrative**
13 **Penalties Under The Arizona Securities Act Without A Jury Trial.**

14 Respondent argues that, because it received no benefit from its wrongful conduct, the
15 remedies of restitution and administrative penalties sought by the Securities Division are severe
16 penalties, entitling it to a jury trial. This argument is wrong because the authorized remedy of
17 restitution under A.R.S. § 44-2032(1) is not a severe penalty for any purpose. Respondent
18 additionally refers to double jeopardy in its attempt to characterize the remedy sought as criminally
19 punitive. Respondent fails to even support that point. *See Martin v. Reinstein*, 195 Ariz. 293, 302,
20 987 P.2d 779, 788 (App.1999)(double jeopardy prohibition does not apply in civil or regulatory
21 action); *see also Hudson v. United States*, 522 U.S. 93, 104 (1997)(while the "civil" or "criminal"
22 label is not dispositive, the legislature's manifest intent is rejected only upon the clearest proof that
23 the statutory scheme is so punitive either in purpose or effect as to negate the legislature's intent).

24
25 ¹ The intent and purpose of the Securities Act of Arizona is for the protection of the public, the preservation of fair and
26 equitable business practices, the suppression of fraudulent or deceptive practices in the sale or purchase of securities,
and the prosecution of persons engaged in fraudulent or deceptive practices in the sale or purchase of securities. This
Act shall not be given narrow or restricted interpretation or construction, but shall be liberally construed as a remedial
measure in order not to defeat the purpose thereof. Laws 1951, ch. 18, § 20.

1 As already discussed, the legislature can enact statutes creating public rights. Enforcement
2 of those rights can be assigned to administrative agencies. Imposing a remedy in the enforcement
3 of the Arizona Securities Act is within the scope of the Commission's duty to enforce the Act. The
4 intent and purpose of the Securities Act is for the protection of the public and the preservation of
5 fair and equitable business practices. The Arizona legislature, in enacting the Arizona Securities
6 Act, gave the Commission the power to impose administrative penalties and to otherwise fashion
7 an appropriate remedy for violations of the Act. The Commission is authorized to *correct the*
8 *conditions* resulting from a violation of the Act, including, *without limitation, a requirement to*
9 *provide restitution*. A.R.S. § 44-2032(1)(emphasis added). The Securities Division seeks an
10 equitable remedy to correct the conditions that resulted from Respondent's wrongful conduct –the
11 loss of substantial sums of money suffered by 49 victims. Thus, the remedy is neither excessive
12 nor punitive.

13 In further support of its argument that restitution beyond its economic benefit is a
14 punishment, Respondent cites a series of cases dealing with disgorgement. In these cases, the
15 Securities and Exchange Commission sought disgorgement in a court of law, not an administrative
16 forum, under its statutory authority to do so.² In this case, the Securities Division is not seeking
17 disgorgement, but restitution. Respondent cites *Tull* for the proposition that "restitution and
18 disgorgement *are one and the same*." ISI's Motion for Jury Trial, p. 8 (emphasis added). The
19 court did not make that statement, nor should such a conclusion be drawn from the court's
20 opinion.³ Restitution and disgorgement are distinct remedies designed to address different
21 objectives. *See SEC. v. Huffman*, 996 F.2d 800, 802 (5th Cir.1993)(a disgorgement order might be
22 more or less than what is required to make the victims whole; it is not restitution.); *Krull v. SEC*,

23 ² 15 U.S.C. §§ 8A(e)(authorizing the SEC to order an accounting and disgorgement in an administrative cease and
24 desist proceeding) and 20(b)(authorizing the SEC to bring enforcement action in district court).

25 ³ In *Tull*, the court, having determined a jury trial was procedurally authorized in that forum, was analyzing whether the
26 remedies sought were appropriate for a jury trial at common law. The court simply stated that while disgorgement and
restitution were equitable remedies, the imposition of civil penalties was not. 481 U.S. at 424. The court found the
disgorgement sought by the government could provide a portion of the restitution to the wronged party. The penalty
sought by the government was intended to go beyond that remedy and impose punishment. *Id.* The court did not
equate restitution with disgorgement.

248 F.3d 907, 914 (9th Cir.2001)(restitution selected as remedy because it was more appropriate to reimburse customers than to disgorge commissions).

The nature of the remedy at issue has not been established as punitive. Respondent repeatedly so stating does not make it so. Even assuming that administrative penalties can be characterized as punitive, they are an authorized remedy under the Act in this administrative forum, and are, typically, a *fraction* of the amount required to right the wrong caused by Respondent's conduct. The Securities Division is seeking restitution to restore the losses suffered by the victims. Under the Arizona Securities Act, restitution is an equitable action to correct the conditions resulting from the Respondent's failure to meet its obligations under the Act to the people investing with its salesman. Respondent's claim that it received no financial benefit from its wrongdoing does not negate the Securities Division's ability to seek redress before the Commission for harm suffered by the victims of that conduct. Restitution is not limited to the amount personally pocketed by any party. The intent and purpose of an order of restitution is *to correct the conditions* resulting from a violation of the Act. A.R.S. § 44-2032(1)(emphasis added). An order of restitution is an authorized remedy in this case, and in this forum.

IV.

FOR PURPOSES OF ITS HEARING PROCEDURES, THE ARIZONA CORPORATION
COMMISSION IS AN ADMINISTRATIVE AGENCY

Respondent argues that “when the Commission conducts the hearing in this matter, it will be exercising its judicial jurisdiction, not an executive function as other administrative agencies.” ISI’s Motion for Jury Trial, p. 5. Respondent thus attempts to distinguish the Commission from those administrative agencies before which the United States Supreme Court has said there is no right to trial by jury. Many administrative agencies, other than the Commission, exercise the three executive, legislative, and judicial powers that have been conferred on the agency by statute. See generally *Batty v. Arizona State Dental Board*, 57 Ariz. 238, 112 P.2d 870 (1941); *Stoffel v. Dept. of Economic Security*, 162 Ariz. 449, 784 P.2d 275 (App.1989) *rev. denied*. The exercise of these

1 powers does not entitle parties to jury trials in administrative forums. *See Cactus Wren Partners v.*
2 *Arizona Dept. of Building and Fire Safety*, 177 Ariz. 559, 869 P.2d 1212 (App.1994)(exercise of
3 judicial power by agency to adjudicate dispute and impose fees did not violate constitutional
4 provision guaranteeing right to jury trial). In this regard, the Commission is not distinct. *See Ariz.*
5 *Const. art. 15, § 6. See also A.R.S. § 41-1067* (which specifically includes the Commission under
6 the auspices of the Arizona Administrative Procedures Act).

7 V.

8 THE PROCEDURE TO WHICH RESPONDENT IS ENTITLED IN PROCEEDINGS BEFORE
9 THE COMMISSION IS SPECIFIED AND DOES NOT INCLUDE A JURY TRIAL.

10 A. **The Arizona Constitution Neither Provides For Nor Implies The Right To A Jury**
11 **Trial In Proceedings Before The Commission.**

12 The Arizona Constitution does not provide for a jury trial in proceedings before the
13 Commission. Respondent states that the Arizona Constitution does not include any provision
14 limiting or removing the right to a jury trial before the Commission. ISI argues: “[i]f the framers
15 [of the Arizona Constitution] intended to limit the right to jury trial to exist only before the courts,
16 the framers would have included such a provision in the Constitution at the same time it preserved
17 the right to trial by jury and created the Commission.” ISI’s Motion for Jury Trial, p. 5. When the
18 framers created the constitution, they did consider such procedural issues by authorizing the
19 legislature to “enlarge the powers and extend the duties of the Corporation Commission, and [to]
20 *prescribe rules and regulations to govern proceedings instituted by and before it.*” Ariz. Const. art.
21 15, § 6 (emphasis added). The legislature has the authority to decide whether a jury trial will be
22 afforded. *See Rothweiler v. Superior Court*, 1 Ariz.App. 334, 341, 402 P.2d 1010, 1017 (1965),
23 *aff’d*, 100 Ariz. 37, 410 P.2d 479 (1966)(legislative discretion regarding right to jury trial afforded
24 considerable margin). The legislature has provided that enforcement proceedings under the
25 Arizona Securities Act shall be conducted according to the procedural standards in the Arizona
26 Securities Act, the Arizona Administrative Procedures Act, and in the rules of practice and
procedure adopted by the Commission pursuant to legislative authority. *See A.R.S. § 40-243 and*

1 *Jenney v. Arizona Express, Inc.*, 89 Ariz. 343, 362 P.2d 664 (1961). No implied constitutional
2 right to a jury trial exists in this forum.

3 **B. The Arizona Administrative Procedures Act Does Not Provide A Right To A Jury**
4 **Trial In Administrative Proceedings.**

5 The Arizona Administrative Procedures Act ("APA") does not provide for a right to a jury
6 trial in an administrative adjudication. The APA specifically provides that an adjudicatory
7 proceeding before an agency is not subject to the strict procedural and evidentiary rules applicable
8 in most court proceedings. A.R.S. § 41-1062(A)(1). The APA sets forth the minimum procedures
9 that must be followed for agency adjudications in Arizona and, with some limitation, allows
10 agencies to grant additional procedural rights. See A.R.S. §§ 41-1061 through 41-1066, and 41-
11 1002(C).

12 The minimum rights provided by the APA include (1) an opportunity for hearing after
13 reasonable notice; (2) the right to present evidence and cross-examine; (3) the right to counsel; and
14 (4) the right to a rehearing and review of the agency decision. See A.R.S. §§ 41-1061 and 44-
15 1062. The APA requires an agency to make written *findings of fact* and conclusions of law when
16 rendering its decision. A.R.S. § 41-1063(emphasis added). The APA is clear that the agency is the
17 finder of fact, not a jury. The APA does not provide for a jury trial in administrative proceedings.

18 **C. The Arizona Securities Act And The Commission Rules Of Practice And Procedure**
19 **Do Not Provide A Right To A Jury Trial In Proceedings Before The Commission.**

20 The Arizona Securities Act and the Commission rules of practice and procedure do not
21 provide for a jury trial in proceedings before the Commission. Respondent states that, in the
22 absence of a rule, provision, or statute limiting the right to a jury trial before the Commission, the
23 Commission must follow the Arizona Rules of Civil Procedure, which provide that the "right to a
24 trial by jury shall be preserved inviolate to the parties." Ariz. Rule Civ. Pro. Rule 38(a). ISI's
25
26

1 Motion for Jury Trial, p. 5.⁴ Respondent is incorrect about the applicability of the Arizona Rules of
2 Civil Procedure.

3 The Commission rules of practice and procedure provide that in cases in which the
4 “procedure is set forth neither by law, nor by these rules, nor by regulations or orders of the
5 Commission, the Rules of Civil Procedure for the Superior Court of Arizona . . . shall govern.”
6 A.A.C. R14-3-101. The absence of a procedure does not mean the issue has not been addressed.
7 Respondent cannot invoke the Arizona Rules of Civil Procedure simply because it does not like the
8 procedure provided. Proceedings under the Arizona Securities Act are heard by an authorized
9 administrative law judge of the Commission and governed by the specific statutes and rules of the
10 Commission. *See* A.R.S. §§ 40-243(A) and 44-1973(B); A.A.C. R14-4-301 through R14-4-308;
11 and A.A.C. R14-3-101 through R14-3-113.⁵ The Commission rules of practice and procedure
12 require an administrative law judge to prepare an opinion and order, including recommended
13 *findings*, conclusions, and order. A.A.C. R14-3-110(B)(emphasis added). The Commission is
14 obligated to follow those requirements. *Cochise County v. Arizona Health Care Cost Containment*
15 *System*, 170 Ariz. 443, 825 P.2d 968 (App.1992)(an administrative agency must follow the rules it
16 promulgates). In its administration of the Arizona Securities Act, the Commission is the finder of
17 fact in administrative adjudications under the Act, not a jury.

18 Because a procedure for determining issues of fact is established in the APA and the
19 Commission rules of practice and procedure, the Arizona Rules of Civil Procedure do not govern in
20 this proceeding. Respondent is not entitled to demand a jury trial under the Commission rules of
21 practice and procedure or under the Arizona Rules of Civil Procedure.

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25 ⁴ The Arizona Rules of Civil Procedure also specify that “any person may demand a trial by jury of any issue *triable of*
right by jury.” Ariz. Rule Civ. Pro. Rule 38(b)(emphasis added).

26 ⁵ The Commission specifically provides parties with the right to enter an appearance, to introduce evidence, examine
and cross-examine witnesses, make arguments, and generally participate in the conduct of the proceeding. A.A.C.
R14-3-104(A).

1 **D. The Decision In *Tull V. United States* Does Not Impact The Procedure For Proceedings**
2 **Before The Commission.**

3 Respondent states that the facts in this case are “indistinguishable” from those in *Tull*. ISI’s
4 Motion for Jury Trial, p. 12. In *Tull*, the government was attempting to collect civil penalties
5 provided for under federal law. Tull demanded a jury trial *in a court* that operated under
6 procedural rules providing for jury trials. In the present case, the Commission, an administrative
7 agency, is attempting to “correct the conditions” resulting from violation of the Arizona Securities
8 Act through an order of restitution. See A.R.S. § 44-2032(1). *Tull* has no relevance to the present
9 case before this tribunal.

10 In *Tull*, the government brought suit in the United States District Court for the Eastern
11 District of Virginia under 33 U.S.C. § 1319(b) to enforce compliance with the Clean Water Act.
12 That statute provides “[t]he Administrator is authorized to commence a civil action. . . in the
13 district court of the United States . . . and such court shall have jurisdiction . . .” Rule 38(a) of the
14 Federal Rules of Civil Procedure for the United States District Courts, and Rule 38 of the local
15 rules of practice of the United States District Court for the Eastern District of Virginia both provide
16 for a procedure to demand a jury trial. With respect to actions brought in federal district court, it
17 can be presumed that, when enacting § 1319(b), Congress knew the Federal Rules of Civil
18 Procedure for the United States District Courts would apply to proceedings before the “district
19 court of the United States.” Federal rules of procedure do not govern proceedings before the
20 Commission. Because *Tull* was brought in federal district court under § 1319(b), it triggered the
21 constitutional question regarding the right to a jury trial. The court noted the Clean Water Act and
22 its legislative history created an ambiguity whether Congress intended to grant the right to a jury
23 trial during the liability or penalty phase under that act. In the “statutory silence,” the court
24 addressed the constitutional question of the right to a jury trial. 481 U.S. at 417 n.3 (citing *Curtis v.*
25 *Loether*, 415 U.S. 189, 192 n. 6 (1974)(when the construction of the statute makes it possible to
26

1 avoid the constitutional question of the applicability of the Seventh Amendment, such
2 constitutional question can be avoided)).

3 In the present case, no ambiguity exists regarding Respondent's right to a jury trial in this
4 forum. The Commission's procedural authority is clear. Unlike this proceeding, the dispute in *Tull*
5 was not an adjudication before an administrative tribunal, but was in a forum that provided a
6 procedure for a trial by jury. *Tull* is neither analogous, nor even relevant to the present case.

7 VI.

8 RESPONDENT HAS NO RIGHT TO REMOVE THE PROCEEDING TO SUPERIOR COURT 9 TO OBTAIN A JURY TRIAL IN THIS MATTER

10 In the absence of the Commission's ability to empanel a jury, Respondent requests that the
11 proceeding be filed in superior court. This request is not appropriate and must be denied. This
12 proceeding is properly before this tribunal and comports with the constitutional requirements for
13 due process. *See generally Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)(essential
14 elements of due process in an administrative hearing are notice and opportunity for response);
15 *Morrissey v. Brewer*, 408 U.S. 471 (1972)(non-criminal proceedings do not trigger the full panoply
16 of rights). Respondent cannot compel a change in forum in order to obtain the procedure
17 Respondent desires. No one has a vested right in any given mode or procedure. *Cf. Crane v.*
18 *Hahlo*, 258 U.S. 142, 147 (1922). Denial of Respondent's demand for a jury trial does not deny
19 Respondent due process in this forum. Part of the due process provided under the Arizona
20 Securities Act includes the review of Commission decisions by the superior court. A.R.S. § 44-
21 1981.

22 VII.

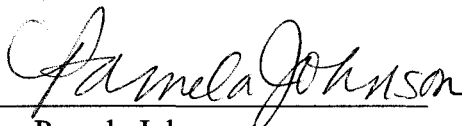
23 CONCLUSION

24 Respondent's argument can be summarized as follows: the Commission cannot impose a
25 penalty or order restitution without a jury trial; absent the Commission's ability to empanel a jury,
26 the action must be filed in superior court. Essentially, Respondent argues the Commission cannot
order restitution and impose penalties, which it is constitutionally and statutorily authorized to do,

1 because it cannot adjudicate such claims before a jury, which it is not authorized to do. This
2 position is absurd.

3 This proceeding is properly before the Commission under its constitutional and statutory
4 authority. No right to a jury trial in this forum exists under the Arizona Constitution, the statutes
5 and rules of the Commission, the APA, or under the Arizona Rules of Civil Procedure. The
6 Commission is not required, nor is it authorized, to provide Respondent a jury trial of this matter.
7 Respondent's demand for jury trial must be denied. Denial of Respondent's demand for a jury trial
8 does not require the proceeding be filed in superior court. Adjudication of this matter is
9 appropriate before the Commission. The procedure for such adjudication is set forth in statute.
10 Respondent cannot compel a change in the forum in order to obtain the procedure it desires.

11 RESPECTFULLY SUBMITTED this 23rd day of September, 2003.

12
13 By 
14 Pamela Johnson
15 Attorney for the Securities Division

16 ORIGINAL and thirteen copies of the foregoing
17 hand-delivered this 23rd day of September, 2003 to:

18 Docket Control
19 Arizona Corporation Commission
1200 West Washington Street
20 Phoenix AZ 85007

21 COPY of the foregoing hand-delivered
22 this 23rd day of September, 2003 to:

23 Philip J. Dion, III
24 Administrative Law Judge
Arizona Corporation Commission
1200 West Washington Street
25 Phoenix AZ 85007
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1 COPY of the foregoing faxed and mailed
2 this 23rd day of September, 2003 to:

3 Alan S. Baskin, Esq.
4 Laura Schoeler, Esq.
5 Roshka Heyman & DeWulf, PLC
6 One Arizona Center
7 400 East Van Buren Street, Suite 800
8 Phoenix AZ 85004

9 Burton W. Wiand, Esq.
10 Fowler White Boggs Banker, P.A.
11 501 East Kennedy Blvd., Suite 1700
12 Tampa FL 33602
13 Attorneys for Respondent
14 InterSecurities, Inc.

15 Brian J. Schulman, Esq.
16 Kutak Rock LLP
17 8601 North Scottsdale Road, Suite 300
18 Scottsdale AZ 85053
19 Attorney for Respondents Gregory Russell Brown
20 and Karen Brown
21
22
23
24
25
26

